

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN GRIER, : CIVIL ACTION
:
v. :
:
JO ANNE B. BARNHART, :
Commissioner of Social Security, :
NO. 01-2427

MEMORANDUM AND ORDER

McLaughlin, J.

May 6⁵, 2002

This action arises from the denial of the application of the plaintiff, Carolyn Grier, for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. Before the Court are the parties' cross-motions for summary judgment. Upon consideration of the motions and papers responsive thereto, a review of the Report and Recommendation filed in this case, the objections thereto, the plaintiff's response to those objections, and the administrative record, the Court orders that this case be remanded to the Social Security Administration for further proceedings consistent with this memorandum.

I. Procedural History

The procedural history of this case is set forth in the Report and Recommendation, and is incorporated herein. In summary, the plaintiff Carolyn Grier, a 56-year-old woman who has not worked

since 1988, filed an application for SSI on July 9, 1997. Transcript of Administrative Record ("Tr.") 86. It was denied initially and upon reconsideration. On April 20, 1998, the plaintiff filed a request for an administrative hearing before an Administrative Law Judge ("ALJ"). The hearing was held on February 3, 1999. On March 30, 1999, the ALJ issued a decision denying the plaintiff's requests for disability benefits, based on his finding that she could perform her past relevant work activity as a hotel housekeeping supervisor. The plaintiff filed a request for review with the Social Security Administration Appeals Council, which was denied on April 11, 2001. The ALJ's decision is therefore the final decision of the Commissioner. Tr. 4.

In the complaint in this case, the plaintiff seeks review of the ALJ's decision. She argues that the decision is not supported by substantial evidence as to her ability to perform her past relevant work, her residual functional capacity for light work, or the availability of other jobs. After she and the Commissioner filed cross-motions for summary judgment, the case was referred to a United States Magistrate Judge for a Report and Recommendation ("R & R"). On March 11, 2002, the Magistrate Judge issued an R & R finding that summary judgment should be entered in favor of the plaintiff.

The defendant has objected to the R & R, arguing that the Magistrate Judge improperly re-weighted the evidence in the

case, and that the ALJ's findings were supported by substantial evidence.

11. Personal and Medical History

The record contains the following evidence relating to the plaintiff's various medical conditions, medications, and other treatment.

Ms. Grier has a chronic obstructive pulmonary disease. Her condition involves both sarcoidosis,¹ which is a thickening of the lung tissues that stiffens the lungs and makes it difficult to transfer oxygen into the lungs, and chronic sinusitis. Tr. 281, 583, 494, 609. She thus has problems breathing when exposed to aerosols, smoke, and many odors, including perfumes. To treat these breathing difficulties, Ms. Grier has been prescribed Methprednisolone, Bactrobin, Nasarel, Claritin, and Augmentin. Tr. 576-77. She also underwent functional endoscopic sinus surgery. Tr. 287. Consistent with her sarcoidosis, and her treatment involving steroids, she has also had recurring, painful subcutaneous nodules on her skin. Tr. 37, 551.

Ms. Grier has suffered from low back pain, and pain in her hips. Her medical records from Episcopal Hospital reflect findings consistent with mild osteoarthritis in her lumbar spine

¹ She was diagnosed with sarcoidosis in 1994. Tr. 494.

and in her hip joints, mild scoliosis, and low bone mass, or degenerative disc disease. Tr. 348-362. Her treatment has involved injections into her trigger points, the use of a lumbar corset, and prescriptions for prednisone, Motrin, Naprosyn, Propoxy, and Darvocet.

The plaintiff is also diabetic. She was originally prescribed insulin to treat her diabetes, but now takes glucophage daily. Tr. 334, 576.

According to reports from Dr. Bernice Gall of the Episcopal Hospital Ophthalmology Department, and Dr. Nibondh Vacharat of the Bustleton Eye Associates, Ms. Grier also has chronic narrow angle glaucoma of both eyes.² To treat this impairment, she has undergone laser peripheral iridectomies³ in both eyes, and takes a daily Betoptic drug regimen. Tr. 233, 244, (list all other cites).

Ms. Grier has also suffered from abdominal pains. As reflected in a May 9, 1997 report from her treating physician, Dr. David Cohen, she was diagnosed with gallbladder polyps, for which she underwent a cholecystectomy on May 30, 1997. Tr. 227-232.

² Glaucoma is a disease of the eyes characterized by an increase in pressure within the eyes, i.e., increased ocular pressure.

³ Schmidt, Attorney's Dictionary of Medicine G-84 (Matthew Bender 2001).

³ **An** iridectomy is a surgical operation involving the removal or part, or all, of the iris. 3 Schmidt at 1-196.

Around the time of this application, Ms. Grier was five feet in height, and weighed 161 pounds, rendering her significantly overweight for her height. Tr. 225, 535.

III. Discussion

Applicants for social security benefits must show an inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Commissioner of Social Security conducts a five-step inquiry to evaluate a claimant's entitlement to benefits, pursuant to 20 C.F.R. § 404.1520.

The Commissioner first determines whether the claimant is involved in "substantial gainful activity." 20 C.F.R. 404.1520(b). If the claimant is not, the Commissioner next determines whether the claimant has a "severe impairment." Here, the ALJ determined that the plaintiff had not engaged in substantial gainful activity since June 1, 1990. Tr. 12. He also found that the claimant's chronic obstructive pulmonary disease, glaucoma, diabetes, and mild degenerative disc disease were severe impairments. Tr. 13-14.

In the third step of the inquiry, if the claimant is found to have one or more severe impairments, the Commissioner

determines whether the impairments, either singly or in combination, meet or equal any of the impairments listed at Appendix I of sub-part P of Part 404 of 20 C.F.R. Here, the ALJ found that none of the claimant's impairments met applicable listings.

Where there is no such applicable impairment met at step three, the Commissioner proceeds on to the fourth step, which involves determining whether the claimant's impairments prevent her from doing her "past relevant work."

Finally, if the claimant is found unable to perform her past relevant work, the fifth step of the inquiry requires the Commissioner to determine whether, considering the claimant's age, education, past work experience and residual functioning capacity, she is able to perform other work that exists in the national economy. Morales v. Apfel, 225 F.3d 310, 316 (3d Cir. 2000) (citing Brewster v. Heckler, 786 F.2d 581, 583-84 (3d Cir. 1986)). Whereas at stages one through four, it is the burden of the claimant to establish disability, at step five, the burden becomes the Commissioner's to show that there is work the claimant can perform. See Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999).

The ALJ ended his analysis at step four. He held that, "[t]he record reflects that the claimant was able to perform a wide variety of physical activities," and that "the record supports a conclusion that the claimant has not presented evidence that shows

that she was precluded from performing substantial gainful activities." Tr. 15-16. The ALJ also found that Ms. Grier could perform work at the light exertional level,⁴ and that accordingly, 'she was able to perform her past relevant work activity" Tr. 16. However, the ALJ qualified that the plaintiff could only perform such work if it "allow[ed] for [her] limitations in that she should avoid excessive exposure to temperature extremes, wet/humid environments, fumes, odors, and dusts, and poor ventilation." Id.

This Court's role on review is to ascertain if there is substantial evidence in the record to support the ALJ's decision. See 42 U.S.C. § 405(g); Burnett v. Commissioner of Social Security Admin., 220 F.3d 112, 118 (3d Cir. 2000). Substantial evidence constitutes "such relevant evidence as a reasonable mind might accept as adequate," and is 'more than a mere scintilla." Id. (internal quotations omitted). If the ALJ's findings are supported by substantial evidence, the Court must accept them, even if it would have decided the inquiry differently. Fargnoli v. Massanari, 247 F.3d 34, 38 (3d Cir. 2001).

⁴ **Light work "involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls."** 20 C.F.R. 404.1567(b).

The Court finds that the ALJ's finding at step four, that Ms. Grier was capable of performing her past relevant work, is unsupported by substantial evidence. The ALJ relies on several statements and preliminary conclusions in support of his ultimate conclusion on Ms. Grier's ability to return to her past relevant work. The Court will address each in turn.

The plaintiff's daily activities. The ALJ states that "the claimant testified that she is able to perform some household chores such as cleaning, light dusting, laundry and shopping. She also testified that she walks her nephew to and from school on most days. She also testified that she can take public transportation, visits with friends, and that she is independent in personal hygiene." Tr. 15.

First, the Court finds the ALJ's statements about Ms. Grier's testimony to be without substantial evidentiary support. In her testimony, Ms. Grier stated that she is generally able to perform certain chores or walk her nephew to school on good days, but that she has more bad days than good days. Tr. 43. On bad days, she "ache[s] so bad" that she does "really nothing," and "lay[s] around most of the time" Id. Even on good days, she testified that she can only do a little housework each day, until she starts feeling badly. Id.

Ms. Grier testified that she can only go shopping when someone accompanies her, because she is unable to carry anything.

Id. 47. Although she does sometimes take public transportation, she stated that on some days it is "difficult for [her] to get on a bus," and it gives her "a problem to lift [her] legs up sometime to get up and down" Id. 42. Regarding visiting with friends, Ms. Grier testified that, in contrast to when she first moved into the neighborhood and was friendly with her neighbors, since 1994, she has become more of a "to myself person." ~~Id.~~ In fact, she testified to only seeing her sister - who lives only a block away - around once a week. Id. 49.

According to this testimony, Ms. Grier's activities are sporadic at best. The Court of Appeals has clearly held that such activities cannot be used to show an ability to engage in substantial gainful activity or to disprove disability. Fagnoli v. Massanari, 247 F.3d 34, 40 n.5 (3d Cir. 2001); Smith v. Califano, 637 F.2d 968, 971 (3d Cir. 1981).

Second, even if Ms. Grier had testified that she was able to carry out these activities daily, that would not provide substantial evidence that she could perform her past relevant work. Her daily activities can be structured to be performed at her pace and on her timetable. There is unlikely to be comparable flexibility in an employment setting.

Medical evidence on ability to perform activities. The ALJ states that the claimant did not introduce medical evidence to support a finding that she was precluded from performing

substantial gainful activities, and that, in fact, the record reflected her ability to perform "a wide variety of physical activities." The Court finds these statements to be without substantial evidentiary support. Rather, the plaintiff's medical records document the ailments described above - sarcoidosis, chronic sinusitis, diabetes, glaucoma, arthritic and abdominal pain, degenerative disc/joint disease - as well as troubling side effects of the various medications she takes, including rashes, loss of bone mass, blood abnormalities, weight gain, adrenal suppression, arthritis and arthralgias, and focal fatty liver. Tr. 218, 221, 294, 295, 555.

The ALJ also states that the record contains no reports from any treating source indicating that the claimant was precluded from engaging in substantial gainful activities. It is not clear to this Court whether the ALJ ignored the May 13, 1997 Employability Re-Assessment Form completed by Dr. David Cohen, the claimant's treating physician since 1993, or whether the ALJ simply did not classify the document as a "report". On that form, Dr. Cohen indicated his assessment that Ms. Grier "has a physical or mental condition which permanently precludes gainful employment." Tr. 380. Although such check-box forms normally constitute weak evidence, a treating physician's opinion cannot be rejected without reference to other medical evidence of record, and without adequate explanation. Fargnoli v. Massanari, 247 F.3d 34, 43 (3d Cir.

2001). The Court finds such adequate explanation lacking in the ALJ's report.

Plaintiff's pain. The ALJ also improperly discounts the plaintiff's complaints about pain, and the other record evidence substantiating that pain. In the Third Circuit, "[w]here medical evidence does support a claimant's complaints of pain, the complaints should then be given 'great weight' and may not be disregarded unless there exists contrary medical evidence." Mason v. Shalala, 994 F.2d 1058, 1067-68 (3d Cir. 1993) (citation omitted). Subjective complaints of pain are of particular importance when they are reflected in a claimant's physician's notes contemporaneous with treatment and examination. See Dorf v. Bowen, 794 F.2d 896, 902 (3d Cir. 1986). Complaints of pain made before a claim for disability benefits has been filed may be entitled to even more weight. Id.

As a threshold matter, substantial medical evidence in this case supports Ms. Grier's complaints of pain. The medical records from her treating physician and various specialists reflect that she has encountered headaches due to her chronic sinusitis, abdominal pains that may have been related to polyps in her gallbladder, and mechanical and musculoskeletal back pain and hip pain, related to her weight, her arthritis, and possibly her steroid treatment for sarcoidosis. Tr. 219, 221, 241, 260, 275, 278, 289, 291, 295, 325.

The ALJ states that Dr. Cohen's records through December 1998 reflect Ms. Grier's "improved and stable" conditions, as to her arthritic pains and abdominal pains. The Court finds this conclusion unsupported by substantial evidence. Rather, Dr. Cohen's notes reflect that her complaints of abdominal pains and arthritic pains have continued:

- a On July 11, 1997, Dr. Cohen received the results of Ms. Grier's surgery, which revealed large gallstones adherent to the gallbladder wall and a large intra-abdominal lymph node, consistent with her sarcoid. Tr. 225.
- a On August 12, 1997, and October 7, 1997, Ms. Grier complained of back pain. Tr. 224.
- a On December 2, 1997, Ms. Grier complained of multiple aches and pains, especially in her low back and hips, which was most likely arthritis related. Tr. 221.
- On March 27, 1998, Ms. Grier complained of diffuse arthritis and arthralgias. Tr. 552.
- On May 29, 1998, Ms. Grier complained of abdominal pain, and on examination her abdomen was slightly obese and moderately distended. Tr. 547.

- As of October 13, 1998, Ms. Grier was seeing Dr. Gilman, who was following up on her abdominal pains. Tr. 543.
- On November 10, 1998, Ms. Grier was suffering from musculoskeletal pains. Tr. 542.

The ALJ also states that "the types of medications taken and the claimant's activities of daily living . . . are found to be somewhat inconsistent with an individual experiencing totally debilitating pain. . . ." Tr. 16. This Court has already held that the ALJ's conclusion about Ms. Grier's activities of daily living are unsupported by substantial evidence. As for the probative nature of her medications, there is record evidence that she has been prescribed, at various times, Tylenol 3, Propoxy, Motrin, and Darvocet specifically for pain. As of February 3, 1999, a month before the hearing in the case, she reported taking Propoxy and Darvocet daily for pain. Tr. 576. Accordingly, the Court disagrees that Ms. Grier's drug regime provides any basis to discount her complaints of pain and the medical record evidence corroborating her pain. Compare Williams v. Apfel, 98 F. Supp.2d 625, 633 (E.D. Pa. 2000) (ALJ may consider that claimant took only non-prescription Advil for pain); Maniaci v. Apfel, 27 F. Supp.2d 554, 558 (E.D. Pa. 1998) (same).

Report of non-treating consultative examiner. The ALJ also relies on an October 27, 1997 consultative examination and

report from Dr. Hass Shafia, in which the doctor concluded that Ms. Grier's "diabetes mellitus, glaucoma, sarcoidosis and arthritic pains were all well-controlled" and that, but for a mild tenderness in her low back and legs, and obesity, Ms. Grier had no restrictions. Tr. 15. The Court finds that this report does not constitute substantial evidence for at least two reasons. First, to the extent that Dr. Shafia's findings differ from those of Dr. Cohen, Ms. Grier's long-term treating physician, greater weight should be given to Dr. Cohen's findings. See Adorno v. Shalala, 40 F.3d 43, 47 (3d Cir. 1994). As noted above, Dr. Cohen's records do not reflect that Ms. Grier's conditions were all well-controlled. Dr. Cohen's reports are particularly probative because they represent a span of time, from which one can better evaluate the chronic nature of Ms. Grier's conditions and her improvement or deterioration. By contrast, Dr. Shafia's report presents only a snapshot.

Second, the Court finds Dr. Shafia's report even less probative based on Ms. Grier's testimony that she spent only 15 to 20 minutes with Dr. Shafia, and because the report seems to reflect that Dr. Shafia was not presented with Ms. Grier's medical records.

Reports of non-treating state agency medical consultants. The ALJ also points to reports from three state agency medical consultants, who concluded that Ms. Grier could occasionally lift 50 pounds, could frequently lift 25 pounds, could

stand or walk about 6 hours in an 8-hour workday, and could sit about 6 hours in an 8-hour workday. Tr. 111-134. The ALJ recognizes the limited weight properly accorded to form reports by non-treating physicians where unaccompanied by thorough written reports, but states that the opinions were "consistent with the objective findings of record." The ALJ does not, however, identify what those findings of record are. The Court, having reviewed the entire record - especially Ms. Grier's testimony and the reports of her treating physician - finds no substantial objective support, outside of these form reports, for the conclusion that Ms. Grier had the physical capabilities these consultants describe.

Testimony of vocational expert. Finally, the ALJ relies on the testimony of a vocational expert in this case. The expert testified that although Ms. Grier's last position as a housekeeping supervisor was performed at the "medium" exertional level,⁵ according to the Dictionary of Occupational Titles, it is defined as a light exertional position. Tr. 57. The ALJ thus presented two hypotheticals to the expert, asking her to comment on what jobs existed in the light work category that she believed Ms. Grier could perform, with the limitation that "she should not have to work in temperature extremes. . .[or] an atmosphere of fumes,

⁵ Work at the "medium" exertional level involves lifting no more than 50 pounds at a time, with frequent lifting of objects weighing up to 25 pounds. 20 C.F.R. § 404.1567(c).

odors, dust, poor ventilation and especially aerosols". Tr. 57. The ALJ inquired about both skilled positions, and unskilled positions. Id. 57-58. The expert testified that jobs existed, including file clerk and assembler. But on cross-examination, the vocational expert admitted that the jobs she reported as available did not take account of the plaintiff's difficulties with perfume, which, she stated, "could be a problem for her" because most workplaces have no policy forbidding the wearing of perfume. Id. 60. Additionally, the expert testified that most workplaces will tolerate absenteeism up to only 12 days per year. Id. 61.

Nonetheless, the ALJ concludes that Ms. Grier could return to her prior relevant work, as a housekeeping supervisor. He does not explain how, in such a position, Ms. Grier would be able to avoid environmental factors like aerosols and perfumes.

For all of the reasons stated above, the Court reverses the ALJ's decision on step four of the analysis. The Court finds no need for remand on this issue, because it finds no substantial evidence in the record to support the ALJ's determination.

The Court, however, will remand the case for further proceedings as to step five. District courts are to award benefits only when the administrative record has been fully developed. Morales v. Apfel, 225 F.2d 310, 320 (3d Cir. 2000). Because the ALJ focused only on the light exertional level, the Court is unable to determine whether Ms. Grier has a residual functional capacity

that allows for the less strenuous sedentary work. The Court understands why the Magistrate Judge recommended not remanding on this issue, given the strength of Ms. Grier's testimony and medical evidence, and especially her diagnosis, post-dating the ALJ's decision, of osteopenia. Nevertheless, in the absence of an explicit finding at step five, the Court finds remand appropriate.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN GRIER,

CIVIL ACTION

v.

JO ANNE B. BARNHART,
Commissioner of Social Security, :

NO. 01-2427

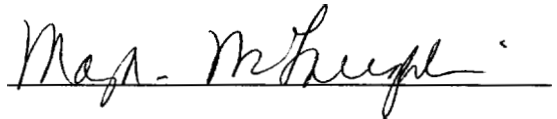
ORDER

AND NOW, this 6th day of May, 2002, upon
consideration of the plaintiff's Motion for Summary Judgment
(Docket No. 14), the defendant's Motion for Summary Judgment
(Docket No. 10), the plaintiff's reply brief in support of her
motion for summary judgment, the Report and Recommendation filed
by Magistrate Judge M. Faith Angell, the objections filed by the
defendant to the Report and Recommendation, and the response
thereto filed by the plaintiff, and after a careful review of the
administrative record, IT IS HEREBY ORDERED THAT:

The Report and Recommendation is APPROVED in part and
DISAPPROVED in part. It is approved insofar as it reverses the
determination of the Administrative Law Judge on step four. It
is disapproved to the extent that it recommends that benefits be
granted based on the record as it presently stands. The

plaintiff's motion for summary judgment is GRANTED as to reversal of the ALJ's determination on step four, and DENIED as to the request for remand solely for benefit determination, and the defendant's motion for summary judgment is DENIED. The case shall be remanded for further administrative proceedings consistent with and for the reasons given in a Memorandum of today's date.

BY THE COURT:

A handwritten signature in cursive script, reading "Mary A. McLaughlin", is written over a horizontal line.

Mary A. McLaughlin, J.